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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 22

NINA KINSELLA, WARDEN, APPELLANT

v.

UNITED STATES OF AMERICA EX REL. ALBERTA SINGLETON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the District Court (R. 63–66) is reported at 164 F. Supp. 707.

JURISDICTION

The judgment of the District Court was entered on September 8, 1958. Probable jurisdiction was noted by this Court on February 24, 1959 (R. 71). 359 U.S. 903. The jurisdiction of this Court rests on 28 U.S.C. 1252.

QUESTION PRESENTED

Whether Article 2(11) of the Uniform Code of Military Justice is constitutional as applied to a

serviceman's spouse who accompanied her husband to Germany and who was convicted by court-martial for a non-capital offense committed in that country.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the Constitution are involved:

> Article I, Section 8. The Congress shall have Power * * *
>
> Clause 14. To make Rules for the Government and Regulation of the land and naval Forces;
>
> * * * * *
>
> Clause 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
>
> * * * * *
>
> Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The pertinent portions of Article 2 of the Uniform Code of Military Justice as codified in 70A Stat. 37, 10 U.S. Code 802, provide as follows:

> Article 2. *Persons subject to this chapter.* The following persons are subject to this chapter:
>
> * * * * *
>
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.
>
> * * * * *

The Act of August 10, 1956, c. 1041, Section 49, 70A Stat. 640, provides:[1]

> * * * * *
>
> (d) If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

STATEMENT

Mrs. Dial is a citizen of the United States and the wife of Specialist Second Class James W. Dial, United States Army. She accompanied her husband to

[1] This severability provision was not codified in Title 10. However, it was part of Public Law 1028, which was enacted into positive law as Title 10. It can be found in 10 U.S.C. p. 958.

his military station in Germany. In June 1957, while in Germany, Mrs. Dial and her husband were charged with involuntary manslaughter arising out of the death of their one-year old infant son, who had died as a result of severe beatings administered by the parents over a period of several weeks (R. 36–37). Involuntary manslaughter is an offense under Article 119 of the Uniform Code of Military Justice, 10 U.S.C. 919. Charges were preferred against Specialist and Mrs. Dial under Article 119, the charges were referred to trial (R. 38), and each of the accused entered a plea of guilty (R. 38, 39). Mrs. Dial, although pleading guilty to the charges, objected to the jurisdiction of the court-martial (R. 38, 53). On the basis of these pleas, the court-martial found Mrs. Dial and her husband guilty of involuntary manslaughter as charged (R. 41). Mrs. Dial was sentenced to confinement at hard labor for three years (R. 45). Her husband received a three-year sentence and a dishonorable discharge (R. 45).

The convening authority approved the sentence of the court-martial (R. 47) and forwarded the record of trial to the Judge Advocate General for review by a Board of Review. On February 14, 1958, the Board of Review approved the findings and sentences as to both Mrs. Dial and her husband (R. 16–22). Pursuant to the provisions of Art. 67(b)(2) of the Uniform Code of Military Justice, the question of jurisdiction over Mrs. Dial under Article 2(11) of the Code was certified to the United States Court of Mili-

tary Appeals (R. 23–24). That court sustained the jurisdiction of the court-martial under Article 2(11) (R. 60–61).

On August 12, 1958, while Mrs. Dial was serving her sentence at the Federal Reformatory for Women, Alderson, West Virginia, a petition for a writ of habeas corpus was filed in her behalf in the District Court by Alberta Singleton, her mother (R. 2–4).

After a hearing, the District Court, on September 8, 1958, entered an order granting the writ of habeas corpus "believing [itself] bound by the decision of the Supreme Court in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger*" (R. 62–66, 68). Notice of appeal was filed on October 8, 1958 (R. 69), and this Court noted probable jurisdiction on February 24, 1959 (R. 71).

SUMMARY OF ARGUMENT

A. This case is similar to *Reid* v. *Covert*, 354 U.S. 1, in that the issue here is the amenability to court-martial jurisdiction of a civilian dependent who was accompanying her soldier husband overseas when she committed an act of violence. But, unlike *Covert*, the offense here was not capital. In the light of the decision in that case—which was strictly limited by the concurring Justices to the question of court-martial jurisdiction over dependents who commit capital offenses—the District Court clearly erred in its holding that the issue here was foreclosed by *Covert*.

B. The *Covert* decision can, and should, be limited to capital offenses by dependents. As was emphasized by Mr. Justice Frankfurter and Mr. Justice

Harlan, where life is at stake a different standard is frequently applied. If the issue is "analogous, ultimately, to issues of due process" (354 U.S. at 44, 53 and 75), then there must occur that balancing of interests which is characteristic of due process problems. In any such balancing, the fact of whether or not life is at stake must weigh heavily. In our view, the Court should here reexamine, in the light of the non-capital nature of this case, all of the ingredients that went into the decision in *Covert:* the historical material; the special status of dependents in the military communities abroad; the alternatives to court-martial jurisdiction; the practicalities of the international situation; the morale of the armed forces overseas; and the need for prompt and on-the-spot American criminal jurisdiction. These are considered at length in our brief in No. 21, *McElroy* v. *Guagliardo.* Upon such a re-balancing, the non-capital nature of the offense in this case should be decisive in favor of the validity of court-martial jurisdiction.

C. In particular, the historical materials from the period of the Revolutionary War and colonial times show, we believe, that accompanying wives were regarded as retainers to the camp, subject to court-martial at least for non-capital crimes.

ARGUMENT

THE RULE ESTABLISHED IN *REID* V. *COVERT* SHOULD NOT BE EXTENDED TO COVER NON-CAPITAL CASES OF DEPENDENTS TRIED OVERSEAS BY COURT-MARTIAL

A. THE ISSUE IS NOT FORECLOSED BY THE *COVERT* DECISION

As in *Reid* v. *Covert*, 354 U.S. 1, the person whose amenability to court-martial jurisdiction is at issue is a civilian dependent who was accompanying her serviceman-husband overseas when she committed an act of violence. This similarity in status led the District Court to consider itself bound by *Covert* and to hold Article 2(11) of the Uniform Code of Military Justice unconstitutional as applied to Mrs. Dial. Whatever may be the ultimate outcome on the merits of the question of whether one in Mrs. Dial's situation is amenable to trial by court-martial, the District Court erred in its holding that the issue was decided in *Covert*. Quite clearly, the question here was not decided by the Court in that case.

Unlike that in *Covert*, Mrs. Dial's offense was not capital. The capital nature of the crime was decisive for the outcome of the *Covert* case. Mr. Justice Frankfurter stated in his concurrence (354 U.S. at 45):

> In making this adjudication, I must emphasize that it is only the trial of civilian dependents in a capital case in time of peace that is in question. * * *

Mr. Justice Harlan, equally emphatic, concurred "on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the

trial of civilian dependents of members of the armed forces overseas in times of peace" (354 U.S. at 65). He further commented that "So far as capital cases are concerned, I think they stand on quite a different footing than other offenses" (354 U.S. at 77). In the light of these remarks by the two concurring Justices—whose votes were necessary for the decision in *Covert*—the view of the District Court that the issue is foreclosed by *Covert* is untenable.[2]

B. THE BALANCE OF INTERESTS FAVORS COURT-MARTIAL JURISDICTION OVER DEPENDENTS IN NON-CAPITAL CASES

Our main argument on the validity of Article 2(11), as applied to the civilian contingent abroad, is set forth in the Government's brief in the companion case of *McElroy* v. *Guagliardo*, No. 21, this Term, at pp. 27–101. Though that case involves an employee, we have included in our brief all the materials and arguments (except for some historical evidence relating to dependents, discussed *infra*, pp. 15–30) bearing on the case of a dependent who is not charged capitally. It is sufficient to say here that

[2] The problem of the severability of Art. 2(11) has been discussed in a slightly different context in our brief *McElroy* v. *Guagliardo*, No. 21, this Term, pp. 18–26. The severability clause contains a provision to the effect that valid applications of Art. 2(11) are to be severed from invalid applications. It is clear that Congress desired to reach what it constitutionally could. At the very least, there is no indication in the Uniform Code or its legislative history to overcome the strong presumption of severability. Furthermore, if the *Covert* decision jeopardized the constitutionality of Art. 2(11) in each and every application because of non-severability, the narrow circumscription of the concurring opinions would hardly have been undertaken.

under modern conditions Congress has reasonably chosen to include dependents of servicemen within the military forces overseas. All the immunities and privileges enjoyed by dependents who reside with American servicemen in foreign countries have been secured on the representation that these dependents are subject to military control. Their actions can and do directly affect the military community as a whole. They are not mere tourists, but quite realistically are part of our overseas military establishments, and as such are properly held accountable under military law for non-capital offenses such as the one involved in this case.

1. We do not contend that this Court should reexamine and overturn its decision in *Covert*. It is rather our position that *Covert* must be limited by the cardinal fact that the offense involved there was capital. Such a limitation would accord with the established principle of this Court to differentiate between what may be constitutionally required in distinguishable, though related, situations. Trial of a civilian dependent overseas for a non-capital crime is significantly different from trial of such a person for a capital crime, if only for the reason that, as Mr. Justice Frankfurter pointed out in *Covert* (354 U.S. at 45), "[t]he taking of life is irrevocable."

The concept of maintaining different standards or considerations in capital cases is not at all new. It was recently expressed by Mr. Justice Frankfurter, concurring in *Griffin v. Illinois*, 351 U.S. 12, at 21:

> Since capital offenses are *sui generis*, a State may take account of the irrevocability of death

by allowing appeals in capital cases and not in others.

Because of this *sui generis* quality it is a part of our jurisprudence that the rights of an accused charged with a capital crime will be given especially painstaking and careful consideration. The responsibility of judge, prosecutor, defense counsel, jury, and appellate court is increased because the ultimate issue at stake is whether the death sentence is to be imposed. It is therefore not uncommon for additional safeguards and protections to be afforded to the accused in this type of case. In the federal system, for example, a defendant charged with a capital crime is entitled to have a list of jurors and of the witnesses who will prove the indictment, with their addresses, at least three days prior to the commencement of trial. 18 U.S.C. 3432. This right is not afforded in non-capital cases. In a capital case, the defendant cannot waive his rights to a grand jury indictment, while this right can be waived in all other cases. Rule 7(a), Federal Rules of Criminal Procedure. Bail in capital cases can be set only by a federal judge having original or appellate jurisdiction in criminal cases, while in other situations any committing magistrate can set bail. 18 U.S.C. 3141; Rule 46(a)(1), F.R.Cr.P.

In the actual trial, there are also differences in treatment of capital cases—as, for example, twice as many peremptory challenges are afforded the defendant when the death penalty is involved. Rule 24(b), F.R.Cr.P. And when an appeal is taken in

capital cases provision is made that the death sentence will be automatically stayed. Rule 38(a). Appellate courts scrutinize convictions in capital cases with special care.

In constitutional terms, capital cases have likewise been set apart for separate evaluation. Mr. Justice Frankfurter, concurring in *Covert,* indicated this concern (354 U.S. at 45–46):

> It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights.

So this Court, in construing the Due Process Clause in *Powell* v. *Alabama,* 287 U.S. 45, decided that illiterate, uneducated Negroes charged with capital crimes had to be afforded counsel for the presentation of their defense. The fact that "above all that they stood in deadly peril of their lives" led the Court to conclude that the defendants had not been afforded due process of law. 287 U.S. at 71. On the other hand, in *Betts* v. *Brady,* 316 U.S. 455, an indigent farm laborer was held not to have been denied due process under the Fourteenth Amendment when he was convicted of robbery without having been allowed court-appointed counsel. The Court again indicated that (316 U.S. at 462):

> Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. * * *

It is clear that the fact that the case was not capital had significant weight in its outcome. Subsequently, the Court pointed specifically to this distinction; in *Uveges* v. *Pennsylvania,* 335 U.S. 437, it was explained (at pp. 440–441):

> Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. * * * Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See *Betts* v. *Brady,* 316 U.S. 455, 462.

These distinctions assume special significance in the present case when it is recalled that Justices Frankfurter and Harlan, in their concurrences in *Covert,* found that the question to be decided in this type of case is "analogous, ultimately, to issues of due process" (354 U.S. at 75).[3]

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[3] Mr. Justice Harlan stated: "And so I agree with my brother Frankfurter that * * * we have before us a question analogous, ultimately, to issues of due process; one can say, in fact, that the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case" (354 U.S. at 75). And Mr. Justice Frankfurter said (p. 53): "This examination, in its similarity to analysis in terms of 'due process,' is essentially the same as that to be made in the present cases in weighing congressional power to make 'Rules for the Government and Regulation of the land and naval Forces' against the safeguards of Article III and the Fifth and Sixth Amendments." See also 354 U.S. at 44.

2. As we have just indicated, the concurring Justices in *Coveri* were of the view that the problem in these cases involves a balancing of various interests—especially the interest in effectively governing the land and naval forces in the light of the need to maintain a huge American military establishment overseas, as against the interests protected by grand jury indictment and trial by jury. In the same connection, these Justices suggested that *In re Ross*, 140 U.S. 453, and the "Insular cases"[4] stand today for the proposition that the particular setting, the practical necessities, the possible alternatives, and the actual impact of the challenged legislation must be examined before deciding whether particular power exercised over Americans overseas is valid. 354 U.S. at 50–64, 67, 74–78.[5] In *Covert*, a capital case, the balance of these factors and interests was felt to swing against the validity of court-martial jurisdiction over dependents. Since the present case is not capital, there must be a fresh evaluation and a new balancing.

Putting to one side the special weight of the capital case (outlined, *supra*, pp. 9–12, and discussed in the

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[4] *Downes* v. *Bidwell*, 182 U.S. 244; *Hawaii* v. *Mankichi*, 190 U.S. 197, *Dorr* v. *United States*, 195 U.S. 138; *Balzac* v. *Porto Rico*, 258 U.S. 298.

[5] We have shown in *Guagliardo*, Brief for the Petitioners, pp. 41–47, as we did in *Covert*, that Article I, Section 8, Clause 14 of the Constitution is properly read in conjunction with the Necessary and Proper Clause to constitute a grant of power susceptible of application under changing circumstances, and is not confined to a fixed and rigid content. See the opinion of Mr. Justice Harlan in *Covert*, 354 U.S. at 67–70.

concurring opinions in *Covert*), we are left with the factors, interests, and considerations which we set forth at length in our *Guagliardo* brief, pp. 71 *ff*. In summary, these are: (a) the need for American forces abroad, and the concomitant need that civilian dependents accompany them; (b) the special status of these dependents as integral parts of the military community for whom the commander is responsible both to this country and to the host nation; (c) the problems of discipline, affecting both the military community itself and the host country, created by the presence of large numbers of dependents (over 455,000), with the consequent need for readily available criminal jurisdiction as sanction and deterrent; (d) the international agreements under which these military communities exist and operate—which permit only American military jurisdiction abroad—and the primacy of the host nation within its own territory; (e) the unavailability and undesirability of alternatives to court-martial jurisdiction for non-capital offenses; and (f) the fairness of present-day court-martial procedures.

We also point out in *Guagliardo* that the true choice is essentially between trial in a foreign court (or no trial at all) and trial by court-martial. It is not likely that the territorial sovereigns in the many areas where our troops—and their dependent and employee complements—are stationed will permit the establishment on their soil of American civilian courts. And the inordinate difficulty and practical impossibility entailed by an attempt to try

civilian dependents in the courts in the continental United States would probably preclude all except a very few trials in this country.

Unlike *Covert,* the balance here swings, we submit, in favor of court-martial jurisdiction. The interests on the side of the accused are less, since the offense is non-capital, and the interests on the side of prompt on-the-spot American criminal jurisdiction are greater, since there is potentially involved a very substantial number of less-than-capital offenses which will be governed by the decision in this case.

C. HISTORICAL MATERIALS SUPPORT THE EXERCISE OF COURT-MARTIAL JURISDICTION IN THIS CASE

Mr. Justice Frankfurter, in *Covert,* said of the historical material adduced by the Government in its briefs in that case (354 U.S. at 64).

> What has been urged on us falls far too short of proving a well-established practice—to be deemed to be infused into the Constitution—of court-martial jurisdiction, *certainly not in capital cases,* over such civilians in time of peace [emphasis added].

In this brief, and in our brief in *McElroy* v. *Guagliardo,* No. 21, this Term, at pp. 28 *ff,* there is set forth historical material which, we believe, does indicate a "well-established practice" of court-martial jurisdiction over civilians serving with and accompanying the armed forces of England and of early America. While most of this material is not new in the present series of cases, a portion of it is. More, it must be reevaluated in light of the overriding fact that the

instant case, unlike *Covert*, does not involve a capital offense. See *supra*, pp. 8–15.

In our brief in *Guagliardo*, the historical evidence presented is concerned primarily with persons who were either employed by or serving with the military forces. This case concerns the wife of a soldier; therefore we concentrate here on the materials bearing on military jurisdiction over wives and other dependents.

As we indicate in our *Guagliardo* brief (p. 30), prior to the Declaration of Independence, the British Articles of War (those adopted in 1765) made specific provision for the court-martial of

> All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though not inlisted Soldiers * * *.[6]

A provision almost identical in language was a part of the Articles of War which governed the American army during the course of the Revolution; it was likewise a part of the Articles of War which were promulgated by the first Congress after the adoption of the Constitution, and of the Articles adopted on April 10, 1806 (2 Stat. 366).[7]

It appears that this provision in its various enactments as a part of English and American law was designed to provide for the trial by court-martial of wives who "accompanied" their husbands to the camp. The dictionary definition of "retainer" current at the time goes far to establish the point. The sole definition of retainer given in Noah Webster's *A Dictionary of*

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[6] Section XIV, Article XXIII.

[7] Article 60.

the English Language published in 1807 is "A dependent." Winthrop,[8] is even more explicit. He states that the term retainers to the camp "may be deemed to include:—1. Officer's servants; 2. Camp-followers attending the army but not in the public service." He goes on to state:

> Members of the families of soldiers or officers, commorant with the army, would be amenable as camp-followers.

The term "camp-follower," which was encompassed in the concept of retainer to the camp, was at the end of the eighteenth centry in no way limited to the modern colloquial usage of a woman of loose morals. The *Oxford English Dictionary* defined camp-follower as "a man or woman who follows or hangs on to a camp or army, without being in military service," and in fact gives, as an illustration of its use in 1810, an excerpt from a letter by Wellington referring to "The proceedings of the General Court Martial, on the trial of Edward Poole, Camp follower."[9]

A study by Walter Hart Blumenthal, entitled *Women Camp Followers of the American Revolution* (1952), reveals that in the colonial period accompanying wives were regarded as a regular part of British armed contingents. He notes (p. 45) that "there was British precedent over here of women with the forces, for a score of years before the Declaration [;] a feminine contingent was conveyed from England with

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[8] Winthrop, *Military Law and Precedents* (2d ed., Reprint 1920), 98, 99n.

[9] A New English Dictionary on Historical Principles (1893), vol. 2, p. 55.

Braddock's command at the outset of the French and Indian War." And further (p. 53):

> British camp women in the Revolution were an established institution. It was the tradition that men-at-arms needed women-at-arms. Nor did the Revolution end the British tradition. Wellington's army in the Peninsular War (1809–1814) had its share of wives and wenches—forty to sixty in every regimental following, astride donkeys, with scores, nay, hundreds, of Portuguese and Spanish helpmates picked up on the road.

That such accompanying women, including wives, were considered subject to court-martial jurisdiction appears from a letter written by one such wife on June 4, 1758, to Colonel Bouquet, from Carlisle jail where her husband was confined for cause and she likewise, for having abused the colonel. In her letter (*id.*, p. 49), she said:

> I have been a Wife 22 years and have traveled with my Husband every Place or Country the Company marcht too and have workt very hard ever since I was in the Army. I hope yr Honour will be so good as to Pardon me this onct time that I may go with my Poor Husband one time more to carry him and my good Officers water in ye Hottest Battle as I have done before. Yr unfortunate Petitioner and Humble Servant, Martha May.

Women were sent over with British troops during the American Revolution, including the early period before the Declaration of Independence when, from the British point of view at least, there was no war,

but merely disorder in the colonies. General Sir William Howe's Orderly Book for the period of June 17, 1775, to May 26, 1776, shows that the British treated the women as a regular part of the army. Orders were regularly issued to account for the women so that provisions could be issued for them.[10] Their

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[10] E. g.:

"*Camp on the Heights of Charleston—6th July 1775* [pp. 34–35]

* * * * *

"A List of the Names and a return of the Numbers of Women and Children in every Corps Encamp'd here to be given in immediately specifying those present with the Corps that the issuing their provisions may be properly regulated, and the quantity ascertained."

"*General Orders Dated Head Quarters—Boston 6th July 1775* [p. 35]

"A return of every Officer, Serjeant, Drummer, Rank and file of each Corps, As also a List of the Names of the Women Children and all other persons followers of the Army, not Soldiers, for whom the Corps draw provisions to be given to the Dy Adjutt Genl on Wednesday Morning next."

"*Head Qrs Wednesday, 13th March 1776* [p. 235]

* * * * *

"Each Corps to apply immediately at No 16 on the long Wharf for a Barrel of Salt fish, to be divided among the Men & Women."

"*Hd Qrs Thursday 2nd May 1776* [p. 262]

"Six Women pr Compy will be allowed to embark with each Rgt, the Commanding Officers will be responsible that no more Women are received on board nor any Children.

"Provisions will be allowed at the rate of half a Ration for each Woman, & a Quarter for each Child that is left behind."

"*Hd Qrs Halifax Tuesday 21st May 1776* [p. 287]

* * * * *

"The Commanding Officers of Regimt & Corps are desired to send returns immediately to the Deputy Qr Mastr Genl of the Number of Officers men & Women that they allot to their respective Transports in order that provisions may be put on Board accordingly."

conduct was regulated.[11] Some form of punishment was also contemplated, often consisting of dismissal from camp,[12] but sometimes taking more drastic form. Mr. Blumenthal's book (p. 42) reports that:

> The wife of a private who was detected as a receiver of stolen goods was sentenced to "one hundred lashes on her bare back, with a cat-o'nine tails, at the cart's tail, in different portions of the most conspicuous parts of the town, and to be imprisoned three months."

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[11] E.g.:

"*Head Quarters Boston 18th Novr 1775* [p. 143]

* * * * *

"Women belonging to the Army will not be Allowed to be present at any Fires that may happen."

"*Head Qrs Boston, 30th Decr 1775* [p. 183]

* * * * *

"* * * The Soldiers Wives are not to lodge out of their respective districts."

"*Camp on the Heights of Charlestown—23rd Sepr 1775* [p. 95]

* * * * *

"No woman to be allowed to pass the ferry without a pass from the Commanding Officer of the Corps to which they belong, and the pass is to be taken from them by the Officer of the ferry Guard when they return from Boston."

"*Camp on the Heights of Charlestown—Wednesday 5th July 1775* [p. 33] * * * *After Order 5 oClock.*

"Some of the Soldiers wives having brought spirituous Liquors from Boston to this Camp, contrary to Orders; the permission for their passing from thence, hither, is stopt, until further Orders."

[12] E.g.:

"*Camp on the Heights of Charlestown—Thursday 22d June 1775* [p. 13]

And for a later period, General Burgoyne's Orderly Book (p. 24) reports the following:

> CAMP NEAR TICONDEROGA,
> 3d JULY, 1777.
> Countersign, *Dover.*
>
> Parole, *St. Honora.*
>
> Brigadier Generals and Brigade Majors as yesterday.
>
> Field Officer Picquet British, Lieut. Col. *Hill.*
>
> Field Officer Picquet German, Major *Paffem.*
>
> It being apparent that Liquor is sold or given to the Savages, notwithstanding the positive and repeated Orders to the Contrary, the Commanding Officers are to assembly the Sutlers and Women of the respective Regiments, and

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* * * * *

"The Commanding Officers will be answerable the Number of Women with their respective Corps do's not Exceed four p[er] Company agreeable to the General Orders of the 20th that those be the best behaved and bring or keep no Children with them. If any Women are found in Camp Contrary to this Order they will be dismiss'd and sent Prisoners to Boston with Positive Directions not to be permitted to return from thence to this Camp."

"*Head Qrs Boston Sunday 10th March 1776—Morning Orders ½ past 8 O'Clock 11th March 1776* [p. 232]

* * * * *

"Any Woman belonging to the Army, that may be found in Town after One O'Clock, will be taken up & sent to the Provost & will be left behind."

"*Head Quarters Boston 14th Octr 1775* [p. 111]

* * * * *

"Women belonging to the Army *convicted* of selling Spirituous Liquors will be confined in the Provost till their is an oppy of sending them away from hence." (emphasis added)

> inform them that the first person found guilty of disobedience shall instantly have their liquors and sutling stores destroyed and turned out of Camp, besides receiving such Corporal *Punishment* as a Court Martial shall inflict. * * *

Other British cases of the trial of women as retainers to the camp include the general court-martial in December, 1775, in Boston, of Anne Hennesy, wife of a private, who was charged with her husband of having broken into a house and stolen property. Both were found not guilty.[13] A general court-martial sitting in Quebec, October 26 to November 1, 1760, tried Elinor Russell, wife of a soldier of the 35th Regiment, for receiving and buying stolen goods. She was found not guilty.[14] In March 1761, a general court-martial held in Montreal tried Katherine David, "spouse of Mr. Bove," and Etien, a Negro woman, for receiving stolen property. It should be noted that these last two cases occurred in peace time, the French and Indian War having ended and the French having signed terms of capitulation on September 8, 1760.

At Freehold, New Jersey, on June 27, 1778, Elizabeth Clarke, a "follower of the army," was found guilty by a general court-martial of violation of the Articles of War for plundering and destroying the house of a farmer, and sentenced to 100 lashes "and then to be drummed out of the Army." The same

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[13] *General Courts Martial for Marching Regiments*, 1775 to 1776, folio 202, Public Record Office, London.

[14] These and the immediately succeeding cases were obtained from unpublished documents in the Public Record Office, London.

general court-martial found Mary Colethate, another follower of the army, not guilty of the same offense. Two other women were tried by a general court-martial sitting on Long Island in July 1778, and found not guilty. One was Mary Jefferies, "follower of the Army," tried for persuading a soldier to desert. The other was Lucretia Ellis, described as a nurse in the regimental hospital, who was tried for murder.

This British practice was carried into the American armies during the revolution. Mr. Blumenthal's book reports (pp. 60-61):

> Among American militia and the Continental line there were far fewer camp wives or other women than with the enemy. Many of the colonial soldiery, whether seasoned volunteers or raw levies, though married were footloose or homeless as a consequence of localities occupied by the British; hence uprooted wives often went along. Efforts were constantly made to curb irregularities and to keep down strumpet stragglers. The basic reasons for permitting camp women were not only that the practice prevailed among all armies, and the knowledge that quotas of women were with the British, but the inescapable fact that inroads of the redcoats had rendered patriot flight necessary in several areas, together with the natural desire of the women to care for their men—an impulse recognized by the American military leaders.

And further (p. 72):

> As the war dragged on, the army was welded, and the recognition of camp women as a collateral part of the forces became imperative.

> A routine grew up in this as in other matters. That discipline was instilled into the new Continental Army is seen by the orders. In the 2nd and 4th New York Regiments there were more than three hundred courts-martial cases from 1778 to 1783.

That General Washington considered the accompanying women subject to court-martial jurisdiction is clear from the following order dealing with the constantly troubling problem of transportation (*Writings of Washington*, Vol. 22, p. 233): [15]

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[15] The problems of transportation are illustrated by the following (Vol. 15, p. 240):

"*General Orders—Head Quarters, Smith's Tavern, Monday, June 7, 1779*

* * * * *

* * * It was too observant also that the heavy baggage of the Army has been very little, if anything diminished, and that the pernicious practice of suffering the women to incumber the Waggons still continues notwithstanding every former prohibition. The General recommends these matters to the particular attention of the officers commanding brigades and that they will take the most vigorous and effectual measures to prevent the like abuses hereafter."

Vol. 9, p. 139:

"*General Orders—Head Quarters, Wilmington, August 27, 1777*

* * * * *

* * * the women are expressly forbid any longer, under any license at all, to ride in the waggons, and the officers earnestly called upon to permit no more than are absolutely necessary, and such as are actually useful, to follow the army."

General Orders—Head Quarters, New Windsor, Tuesday, June 19, 1781

* * * * *

No Women will be suffered to ride in waggons or walk in the ranks this Campaign unless there are very particular reasons for it, of which the General Officer or officer commanding the Division or brigade to which they belong is to be the judge; a written permission only will avail; without this the officers of the day or police are not only authorized to turn them out, but requested to inflict instant punishment upon those who shall be found transgressors of this order.

The Valley Forge Orderly Book of General George Weedon of the Continental Army under Command of Genl. George Washington, in the Campaign of 1777–8, details that on January 29, 1778, one Mary Johnson, wife of a soldier, was tried by court-martial and upon conviction received a sentence of 100 lashes and was drummed out of camp. On the same date Ann McIntosh, wife of another soldier, was also tried by court-martial and was acquitted. pp. 215–216. Again, on February 4, 1778, General Washington issued a General Order relating to women coming to the camp from Philadelphia for the purpose of enticing soldiers to desert. This order recites in part:

* * * if any of them appear under peculiar circumstances of Suspicion they are to be

brought to immediate trial and punishment if found guilty. [*ibid* at p. 221] [16]

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[16] Washington clearly regarded accompanying women as a necessary, if not always wholly desirable, part of his forces. Thus in a letter to the Superintendent of Finance dated January 29, 1783 (v. 26, *Writings*, pp. 78–79), he explained what was evidently regarded as excess expenditure for women:

> dear Sir: As I never saw, nor never heard of the resolve of Congress spoken of the Secretary at War (as mentioned in your letter of the 21st Instt.) and conceive it a right inherent, with Command to limit (as circumstances and the nature of Service may require) the proportion of Women to the Men of an Army I confess I felt myself hurt by the interference of other departments without any previous notice or communication of sentiments with me on the Subject.
>
> * * * * *
>
> It will appear, by having recurrence to my Orderly Book, that an oeconomical attention to the public interest, in this case, has not been wanting; but that upon every return of the number of Women called for (at different periods) when compared with the tofality of the Army, it has been found, that no general Rule consistent with American, or British Customs, could be established that would not encrease the agregate amount of the Issues and therefore that it was better to submit to a surplusage in some Corps than to render the expence greater and the evil more extensive by adopting a limitation whh. would pervade the whole Army. especially too, as some of those Corps were, and still are, under particular circumstances. for instance the Regiments of York, which, in part, are composed of Long Islanders and others who fled with their families when the enemy obtained possession of those places and have no other means of Subsistence. The Cries of these Women; the sufferings of their Children, and the complaints of the Husbands would admit of no alternative. The latter with too much justice remarked "If *pay* is withheld from *us*, and *Provisions* from our *Wives* and *Children* we must all starve together; or commit Acts which may involve us in ruin." Our Wives add they "could earn their

British records for the period following the American Revolution likewise show the exercise of jurisdiction over women camp-followers in the colonies (*i.e.*, "in the field"). Martha Stevens, "camp follower", was tried by general court martial at Saugor, India, for the wilful murder of her reputed husband,

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Rations, but the Soldier, nay the Officer, for whom they Wash has naught to pay them." In a word. I was obliged to give Provisions to the extra Women in these Regiments, or loose by Desertion, perhaps to the Enemy, some of the oldest and best Soldiers in the Service. * * * And in a letter to Major General Knox, dated March 8, 1783, he said (v. 26, p. 199):

> Dear Sir; The Women of the New York Regt. of Artillery have applied to me on the Subject of allowing them and their Children Provisions.
>
> The number of Women and Children in the New York Regiments of Infantry before the new System of Issues took place obliged me, either to depart from that System and allow them provision or by driving them from the Army risk the loss of a number of Men, who very probably would have followed their Wives. I preferred the former and accordingly directed that the whole of the Women and Children then with the Troops, should be allowed to draw as usual. * * *

The report of a meeting of the Board of General Officers on June 12, 1781 (v. 22, pp. 202–203) contains the following:

> The Commander in Chief urged to the Board the necessity of oeconomising Provisions, and recommended to the Generals, particularly the Brigadiers, the Necessity of inspecting the Returns made by their Commissaries upon every drawing Day, * * *. He also desired them to take the following Matters into Consideration and report upon them accordingly.
>
> * * * * *
>
> 4th: The proportion of Women which ought to be allowed to any given Number of Men, and to whom Rations shall be allowed.

Sergeant James Stevens, by stabbing him with a knife. The crime took place on November 11, 1824, with the trial on February 8, 1825. The court found her not guilty of murder but guilty of manslaughter and sentenced her to ten months' imprisonment. The sentence was approved by General Edward Paget, Commander-in-Chief in India and was ordered executed by James Nicol, Adjutant General of the Army.[17]

Less than a year later, a general court-martial was assembled at Merut on August 6, 1825, to try Hannah Fitchit, a British subject and camp follower and the reputed wife of Private Joseph Fitchit. She was tried for the murder of Private Alexander Laird by stabbing him with a bayonet. She was found guilty of manslaughter and sentenced to prison for two years. The sentence was approved, but on review was mitigated to three months' imprisonment.[18]

In 1831, there was an instance in Delhi in which court-martial of an officer's wife was considered. The records show:

> The resignation had been accepted a month prior to the above transaction; otherwise both Lieutenant R. ——— and Mrs. R. ——— might have been tried by a general court-martial; for doubtless the wife of an officer or soldier is a camp-follower.[19]

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[17] Hough, *Precedents in Military Law* (1855), p. 401.

[18] Hough, *op. cit., supra.*, p. 402.

[19] Hough, *op. cit., supra*, pp. 628, 630.

We do not believe that it is an answer to the question of military jurisdiction over persons who are not soldiers that the instances of such courts-martial reported during or prior to the Revolutionary period are few or that the punishment imposed was minimal. We do not have a recording of all cases where the power was exercised. (Indeed, the instances of courts-martial of soldiers which are recorded are not overwhelming in number). And when it is recalled how carefully the Continental Congress surveyed the operations of the Continental Army, it is most unlikely that the members would have permitted any abrogation of freedom by the Army through the exercise of improper court-martial jurisdiction. Moreover, the punishment inflicted cannot be dismissed as being minimal. Even banishment from the camp, insofar as it curtailed the means of livelihood and imputed dishonor, could be real and severe.[20] The severity or lightness of punishment is tested by its effect on the recipient. This was aptly illustrated during the course of the debates in the Constitutional Conventional where Delegate Ellsworth of Connecticut, in discussing the authority to punish the militia, made the point that:

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[20] During the Revolution and thereafter, the sentence to "be drummed out of camp" was considered an ignominious punishment, equivalent to the pillory and flogging. Ganoe, *The History of the United States Army* (Rev. ed. 1942), pp. 16-17. The banishment of a wife from the camp was most severe because it severed her from her husband, her home and her livelihood, and often placed her at the mercy of an alien and, frequently, enemy countryside.

> Three or four shillings as a penalty will enforce obedience better in New England than forty lashes in some other places. [Prescott, *Drafting the Federal Constitution* (1941), p. 519.]

Nor do we believe that one can dispose of this historical evidence that women accompanying their husbands were treated as an integral part of the army by the fact that the accompanying most often took place in time of hostilities. The bulk of the available evidence relates to times of hostility because that is the period when the problem would naturally become most troublesome, and also because the historical records for such periods have been collected. But as shown, *supra*, pp. 18 *ff*, 22, 27–28, the historical materials also appear to show that women were subject to military jurisdiction in times of peace as well, and there does not appear to have been any difference in the principle. See also the letter from Walter Hart Blumenthal, dated February 14, 1957, appended to the Reply Brief for Appellant and Petitioner in *Covert*, at pp. 82–85 (concerning military jurisdiction over women camp-followers in time of peace in the period before the American Revolution).

We submit, in short, that there is a solid historical basis for the exercise of court-martial jurisdiction over dependents of military personnel, and that the exigencies of the present situation are such that today, perhaps even more than in the past, such jurisdiction is "necessary and proper" to the carrying out of the legitimate functions of government.

CONCLUSION

For the foregoing reasons and those set forth in the Brief for the Petitioners in No. 21, *McElroy* v. *Guagliardo*, it is respectfully submitted that the judgment below should be reversed.

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